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NO. 84-1289

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PORT TERMINAL RAILROAD ASSOCIATION,
Petitioner

v.

ROY W. SIMS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTION PRESENTED

The facts and law of this case do not present the question claimed by Petitioner. Rather, the question presented is whether a Railroad can cripple an emplcyee one day, fire him the next day on the charges of the same negligent man who crippled him, and then prevent him from obtaining damages for his loss of earning capacity caused by his injuries.

LIST OF PARTIES

Petitioner — Port Terminal Railroad Association.[1]

Respondent — Roy W. Sims.

1. The Port Terminal Railroad Association is an association of railroads composed of the Missouri-Kansas-Texas Railroad Company of Texas, a corporation; Southern Pacific Transportation Company, a corporation; Burlington Northern Railway Company, a corporation; Houston Belt & Terminal Railway Company, a corporation; Missouri Pacific Railroad Company, a corporation; and the Atchison, Topeka & Santa Fe Railway Company, a corporation.

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STATEMENT OF THE CASE

On April 30th, 1981, the Petitioner, Port Terminal Railroad Association, Yardmaster Rogerson and its employees, negligently kicked two railroad cars from one end of the north yard all the way to the other end of the north yard into a locomotive engine on which Respondent, Roy Sims, was properly eating his lunch in a stopped position. The impact was so severe that it knocked Roy out of his chair and threw him into the equipment. Yardmaster Rogerson was the yardmaster who negligently instructed Sims' crew to do what they did that evening and

negligently failed to warn Sims' crew and the kicking crew about the presence of each other on the track.

Sims told the people on the scene that he was shook up, but that he didn't think that he was seriously hurt. He finished out his work that evening. The next day Sims came back to work. He had trouble walking, had pain in his lower back, and sat in an unusual position on his legs while operating the engine because of pain in his low back.

On the day after his injury Mr. Sims was improperly ordered by the same negligent yardmaster Rogerson who had hurt him the day before to leave his engine during Sims' lunch break. When Rogerson came to the engine, Sims told Rogerson that he was the "son of a bitch" who nearly killed him the night before. The railroad claimed Sims was insubordinate and used that as an excuse to fire him. Petitioner is totally incorrect to assert that Sims was discharged "for a matter totally unrelated" to the injuries for which he sued under the F.E.L.A.

Sims went home after he was confronted by this same negligent yardmaster Rogerson and attempted to treat himself at home with heating pads and rest. After two to three weeks the Claim Agent for the railroad sent Roy to a Dr. James Brannan for treatment of his low back injuries. After he saw Dr. Brannan approximately three times, Dr. Brannan's office told Roy that the claim agent for the railroad was refusing to pay his medical bills anymore.

After being told by Dr. Brannan's office that they would no longer see Roy, he then went to a Dr. Andrew Kant about whom he had heard while working on the railroad.

In the summer of 1982, Dr. Kant told Roy to never do any type of railroad work again and to go into some other type of occupation. Since that day Roy has attempted to get jobs with security companies, oil companies, self service oil stations, car dealerships and grocery stores. He was turned down by all these people when they found out about his back injury.

Before April 30, 1981, Roy had never had any trouble sexually responding to his wife, but since his serious injuries he is unable to physically respond to her. Roy has continuous pain every day and can not handle the duties of a switchman, yardmaster, or engineer. He had worked for the Port Terminal Railroad Association as an engineer since February of 1956. Roy had been married to the same lady for over 36 years at the time of trial. He had never had any type of serious back injury or treatment for any type of back complaints in his life prior to the cars being kicked in on top of him.

Dr. Andrew Kant, a board certified orthopedic surgeon, testified that Roy's neck and back injuries were caused by the cars being kicked in on top of him; that the EMG showed a pinched nerve in the L5-S1 nerve root; and that the myelogram and CT scan showed that Roy had a herniated nucleus pulposus at the L-5, S-1 level. The myelogram also showed a small defect in his neck at the C5, C6 area. At surgery Dr. Kant found a herniated nucleus pulposus, L-5, S-1 with bilateral L5-S1 radiculopathy.

Roy continued to have back pain, leg pain, stiffness, and muscle spasms. Dr. Kant recommended to Roy not to try engineering type work and to do lighter work because engineering would cause recurrent problems with

his back. Dr. Kant stated that his physical back problems would handicap him in trying to perform the duties of an engineer and getting and keeping a job as an engineer. A weight restriction of 30 to 40 pounds on Roy's lifting for the rest of his life was placed on him by Dr. Kant. He felt that Roy has suffered physical pain, mental anguish and physical impairment in the past and will suffer pain, mental anguish and physical impairment in the future because of his back injuries. Dr. Kant felt that any type of osteoarthritis that was already in Roy's back before his injury was aggravated by the collision so as to cause him additional difficulties. Dr. Kant testified that out of ten people applying for any type of a job in Houston that Roy would have the least chance of getting that job if he was the only one with his type of serious low back surgery.

Respondent introduced testimony by Dr. Herbert Lee Brannan, the physician picked by the Railroad claim agent, by deposition. Dr. Brannan testified that Roy had a complete absence of the achilles reflex on testing, that Roy had spasm, and that this train collision aggravated the conditions in Roy's back so as to give him middle and low back problems. Dr. Brannan stated that Roy would have a handicap to some extent in going out into the competitive job market to get and keep a job with his back problems. Dr. Brannan admitted that he would not recommend that a railroad company hire a new employee like Roy with his type of back condition. Dr. Brannan admitted that out of ten people applying for a laboring job in Houston, Roy would have the least chance of getting the job out of those ten if he was the only one with the type of back surgery and back problems that he has.

Roy's wife testified that prior to April 30, 1981, Roy had lifted heavy things and done heavy work around the house, and he had a good strong back all of those years with no complaints of any type of back problems. She testified that Roy and she had a good physical relationship prior to the accident, but it had drastically changed since the accident.

Respondent sued for loss of earning capacity for personal injuries under the F.E.L.A. He sought no reinstatement to his job, no damages for "wrongful discharge", or for past loss of earnings for wrongful discharge. The Trial Court, Court of Appeals, and the Texas Supreme Court clearly understood the differences between an administrative claim because of wrongful discharge under the Railway Labor Act, and a claim for personal injuries under the F.E.L.A. The Courts below properly excluded evidence and instructions on the issue of discharge, and in so doing followed previous federal decisions distinguishing between the two causes of action. Petitioner is absolutely wrong to tell this Court that the Texas Court of Appeals "utterly disregard(ed)" federal authority because the Texas Court did cite controlling federal authority against Petitioner.

RESPONSE TO PETITIONER'S REASON FOR GRANTING THE WRIT

Petitioner is asking this Court to abrogate nearly 100 years of law under the Federal Employer's Liability Act by allowing the Railroad to cripple a man one day, then fire him the next day on the charges of the same negligent man who crippled him, and then prevent him from obtaining damages for loss of earning capacity because of his

F.E.L.A. injuries. Petitioner has requested this Court to make such an incredible, far-reaching decision even though:

a. Petitioner has never made any claim that the loss of earning capacity found in this case was excessive;

b. Petitioner did not seek a new trial because the damages found for lost earning capacity were excessive;

c. Petitioner sought no remittitur claiming that the damages for loss of earning capacity were excessive;

d. Petitioner did not claim in the Court of Appeals that Respondent's damages for loss of earning capacity were excessive;

e. Petitioner made no claim in the Court of Appeals that the failure to give its requested instruction limiting loss of earning capacity caused the rendition of an improper judgment.

Since Petitioner has never made any claim that the loss of earning capacity damage findings were excessive, its substantial rights have not been affected, and there is no basis to grant its writ. Title 28, U.S.C.A. § 2111, provides:

> "On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The total damages found for loss of earning capacity was only $236,546.00. Damages far in excess of such sum can be found in any volume of the Federal Reporter system. *Murray v. Fairbanks Morris,* 610 F.2d 149 (3rd

Cir., 1979); *Moser v. Texas Trailor Corporation,* 623 F.2d 1006 (5th Cir., 1980); and the F.E.L.A. case of *Kansas City Southern Railway Company v. Chaffin,* 658 S.W.2d 186 (Tex. Civ. App. 1983, writ ref'd, n.r.e.) ($1,768,860 affirmed.)

Respondent tried his case on the theory that he had suffered a loss of earning capacity because of his injury. He sought no damages for *loss of wages,* or what he would have made working for Petitioner had he not been injured. Respondent pled in his trial petition for damages for loss of earning capacity because of his F.E.L.A. injuries. Respondent proved through railroad witnesses the wage rates of other railroad engineers in Harris County at times pertinent to his case. Respondent offered issues which were submitted on the loss of earning capacity, not lost wages. Whether or not Respondent lost any wages from the Petitioner was never placed in issue.

The heart of the Federal Employers' Liability Act is contained in Title 45 U.S.C.A. Section 51, which, in part, states:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, employee or employees of such carrier . . ."

In short, the Federal Employers' Liability Act provides damages for lost earning capacity personal injuries suffered by a railroad employee because of the negligence of his employer.

On the other hand, collective bargaining agreements between railroad unions and the railroad inlustry commonly provide procedures for discipline of employees. The Railway Labor Act does not allow an employee to recover FUTURE lost earning capacity.

The F.E.L.A. cause of action for personal injury damages and the administrative procedure set up under the collective bargaining agreement for wrongful discharge are mutually exclusive procedures. If the railroad's argument is accepted in this case, a railroad will be able to fire an injured worker, limit his personal injury damages which are sought because of his injury, and force him to try the contractual issues on the merits of his discharge in his personal injury action when the railroad management made the unilateral decision to fire him in the first place. An injured employee would be deprived of his right to a jury trial on his damages for loss of earning capacity if he was limited to an administrative appeal of a "wrongful discharge" case.

In the case of *Beanland v. Chicago, Rock Island and Pacific Railroad Company,* 480 Fed. 2d 109 (8th Cir. 1973), Mr. Beanland sued his railroad employer alleging an F.E.L.A. cause of action for injuries due to the negligence of the Rock Island; for wrongful discharge, alleging breach of his employment contract; and, third, conspiracy of the Rock Island and its officers in wrongfully discharging him. The Trial Court tried the cause of action under the F.E.L.A. separately. At Page 113, the Court held:

> "Damages resulting from *intentional* acts, such as the discharge, have no place in a personal injury F.E.L.A. action which deals exclusively with *negli-*

> *gence.* 45 U.S.C. § 51. In fact, an action for wrongful discharge would appropriately be in contract and not cognizable at all under 45 U.S.C. § 51."

In *Kelly v. New York, New Haven & Hartford Railroad Company,* 138 F. Supp. 82, (U.S.D.C., Mass. 1956), the Plaintiff brought a cause of action under the F.E.L.A. Plaintiff's counsel was instructed not to claim damages due to a wrongful discharge. In considering the admissibility of the Plaintiff's discharge, the Court, at page 83, stated:

> "More fundamentally, I believe it was error to have admitted, even indirectly, over Defendant's objection, the fact that Plaintiff had been discharged, since this discharge was entirely immaterial to plaintiff's case, and was likely to arouse prejudicial feelings."

Under the administrative procedures of the Railway Labor Act a railroad can have a hearing before its own officers and can unilaterally fire an employee virtually at will. Railroad management serves as the judge and jury at such hearings, and the railroad employee's only recourse is to seek to have such discipline overturned through administrative procedures. *Edwards v. St. Louis-San Francisco Railroad Company,* 361 F.2d 946 (7th Cir., 1966). These procedures can be as long and tedious as litigation, and under some circumstances, result in an appeal to a United States District Court. However, these procedures are contractual in nature and have absolutely nothing to do with personal injuries, damages for personal injuries, future lost earning capacity, or the F.E.L.A. While an employee may obtain "lost wages" depending on his time lost from work, he may also be reinstated to service with no reimbursement of lost wages, or lose his claim completely.

Petitioner is absolutely wrong on page 8 of its brief wherein it states that an employee must use the Railway Labor Act to recover "future earnings" for wrongful discharge. The board, under 45 U.S.C.A., § 153, (o) can only order recovery of back wages "on or before a day named". An employee who wins his case can only get back wages up until the day of reinstatement.

The Railway Labor Act does not provide recovery of future earnings for wrongful discharge, but only lets the employee go back to work. *Alabaugh v. The Baltimore and Ohio Railroad,* 125 F. Supp. 401 (U.S.D.C., Md. 1954) 222 F.2d 861 (4th Cir., 1955), 350 U.S. 839, 76 S.Ct. 77 (cert. denied). See also *Spade v. The Chesapeake and Ohio Railway Company,* 325 F. Supp. 1079 (1971).

Petitioner cites *Shupe v. New York Central System,* 339 F.2d 998 (7th Cir., 1965), for the proposition that a railroad employee is not entitled to recover under the F.E.L.A. for damages incurred for some other reason than the negligence of the railroad. *Shupe* was a case in which a dispute existed over the extent physical ailments complained of by Plaintiff were caused by the accident which resulted in the F.E.L.A. suit. The case had nothing to do with discharge of the employee.

The case of *Andrews v. Louisville & Nashville Railroad Company,* 406 U.S. 320, 92 S.Ct. 1562 (1972), does hold that the resolution of wrongful discharge cases involving railroad employees is an administrative procedure under the Railway Labor Act. In *Andrews,* the Plaintiff pled that he had fully recovered from an accident and was physicaly fit to return to work, but that he had been wrongfully refused employment. He sought damages for lost earnings and attorneys' fees. Whether or not Plain-

tiff in the *Andrews case* had lost any earning capacity as a result of his injury was not in issue.

Petitioner also cites *Sharkey v. Penn Central Transportation Company,* 493 F.2d 685 (2nd Cir. 1974), in which the Court stated that in an F.E.L.A. action for damages, "the Plaintiff is not entitled to recover for wages lost *solely* by reason of his discharge." (Emphasis ours) The Court stated that the principal argument raised on appeal "relates to the question of the responsibility of the defendant for the aggravation of the plaintiff's post-traumatic anxiety neurosis by reason of his discharge by the railroad". It was within this narrow context that the Court stated that an instruction should have been given "that no damages for lost earnings were to be awarded." The Plaintiff had been certified as fit to return to work prior to the time that he was advised of his potential discharge. Therefore, the Court found that there was no cause of action for lost wages other than what might have occurred as a result of his discharge. Accordingly, in finding the damages excessive, and ordering the case to be remanded for retrial, the Court in *Sharkey,* in no way, held that a discharged employee should not receive damages for loss of earning capacity as a result of an injury.

Rogers v. Thompson, 265 S.W.2d 282 (Mo. 1954), was also cited by Petitioner. This was a case in which the Plaintiff admitted fault for causing the collision which caused his injury which resulted in his discharge. Respondent Sims denied fault in causing his injuries and the jury so found.

Regardless of the legal and factual distinctions between the *Rogers* and *Sharkey* cases, and the case before

this Court, any general application of the language in the cases cited by Petitioner to personal injury F.E.L.A. causes of action would destroy the purpose of the Federal Employers' Liability Act which is to allow damages to employees negligently injured by railroad employers.

Petitioner incorrectly asserts that the Railway Labor Act is subverted by the refusal to admit evidence of Respondent's discharge. The Railway Labor Act provides administrative remedies for wrongful discharge, but in no way prevents Respondent from seeking personal injury damages for loss of earning capacity under the F.E.L.A.

Petitioner wrongfully analogizes the case at bar to the situation where a doctor is deprived of practicing medicine because of revocation of his license. A railroad employee does not have to be licensed to be a railroad worker. He may work for any railroad which would hire him. Petitioner shows the unfairness of the position it has taken in this case by stating that no railroad would hire him because Petitioner discharged him. In any event, his loss of future earnings because of wrongful discharge are not, and could not, have been an issue in an F.E.L.A. case where damages were sought for loss of earning capacity because of an injury.

Petitioner contends that Respondent recovered damages for his injury, and for his discharge as if "his discharge were overturned." Such contention is totally incorrect. Respondent recovered damages for his loss of earning capacity which was testified to by Dr. Kant, and by Dr. Brannan, the physician picked by Petitioner. The medical testimony clearly and specifically included medical limitations on Respondent to hold any job, which resulted in a general loss of earning capacity. Petitioner's position

that Respondent can recover past wages only if he prevails in a wrongful discharge case is ridiculous. If this were the law, a Railroad could unilaterally dispose of F.E.L.A. claims by discharging an injured employee for insubordination the day after they hurt him.

Petitioner unfairly states that the Court of Appeals relied on *McIver v. Gloria,* 169 S.W.2d 710 (Tex. 1943) instead of Federal law. Petitioner had claimed in the Court of Appeals, *but not in this Court,* that Respondent should not have been able to prove his past earnings for Petitioner. The Court of Appeals simply pointed out that *McIver's* holding was to the effect that past wages are evidence of lost earning capacity.

In *McIver, supra,* the evidence showed a diminished earning capacity generally, that is, in any business or profession. Respondent's proof was likewise directed to loss of earning capacity.

Nowhere at any stage of the trial, motion for new trial, appeal of this case to the Court of Appeals, or application for writ of error to the Texas Supreme Court, or before this Honorable Court, has Petitioner, in any way contended that the damages for loss of earning capacity found by the Jury were improper or excessive. If Petitioner could not even contend that the damages were excessive, when all of its complaints of error deal with damage issues, it has no basis to claim that an improper judgment was entered in this cause, nor that the Court of Appeals erred in affirming the judgment of the Trial Court.

CONCLUSION

The merits of the discharge of a railroad employee have no place in a personal injury negligence action under the F.E.L.A. Otherwise, a railroad could simply discharge an injured employee and limit his recovery for future earning capacity by proving its unilateral discharge of its employee. Respondent sought no loss of wages because of his discharge in this case, but rather sought loss of earning capacity because of an injury inflicted by the negligence of his employer under the F.E.L.A. A railroad employee's past wages is the most proper and efficient way to prove lost earning capacity.

Respondent never based any of his recovery upon what he would have made had he remained an employee of Petitioner. Accordingly, the Trial Court was absolutely correct in not giving an instruction to the jury that Respondent could not recover from Petitioner for loss of earning capacity based on what he would have received from Petitioner had he not been injured.

Petitioner never claimed that the damages for loss of earning capacity were excessive in this case.

The jury heard the evidence, found appropriate damages, and not even the Petitioner claimed that the damages are excessive.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be refused and the judgment of the Court of Appeals and the Trial Court be in all things affirmed.

Respectfully submitted,

GARRETT, LETBETTER & PAYNE

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Response to Petitioner's Application for Writ of Error has been forwarded to Mr. Gordon A. Holloway, Mr. Kyle M. Rowley, and Ms. Teresa W. Folger, SEWELL & RIGGS, 800 Capital Bank Plaza, Houston, Texas 77002 on this 27th day of March, 1985, in accordance with the Rules of the United States Supreme Court.

Tom R. Letbetter

TOM R. LETBETTER